BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **HUGO LANDEROS** From dismissal from the position of Employment Program Representative with the Employment Development Department at Pacoima	)	SPB Case No. 03-3190 **BOARD DECISION** (Precedential) **NO. 04-04** October 5, 2004

APPEARANCES: Armond Keith and Fernando Acosta,[1] Labor Relations Representatives, California State Employees Association, on behalf of appellant, Hugo Landeros; Cynthia Z'berg Lebov, Senior Staff Counsel, Employment Development Department, on behalf of respondent, Department of Employment Development Department.

BEFORE: William Elkins, President; Ron Alvarado, Vice President; Sean Harrigan, Maeley Tom, and Anne Sheehan, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected a decision of an administrative law judge (ALJ). The ALJ had granted appellant's motion to dismiss based upon a finding that the department improperly circumvented the decision of its Skelly[2] officer by re-serving a notice adverse action of dismissal after the Skelly officer had recommended that the adverse action be modified to an action other than dismissal. In this Decision, the Board concludes that the Department did not violate appellant's Skelly rights and remands the matter for a hearing on the merits.

[1] Mr. Keith represented appellant at the hearing before the administrative law judge and in the written submissions to the Board. Mr. Acosta appeared on behalf of appellant at oral argument before the Board.

[2] Skelly v. State Personnel Board (1975) 15 Cal.3d 194.

BACKGROUND

Factual Summary

Appellant began employment in the position of Motor Vehicle Field Representative with the Department of Motor Vehicles (DMV) on April 13, 1988. On May 28, 2002, appellant was appointed as an Employment Program Representative with the Employment Development Department (EDD or Department).

On August 21, 2003, the Department served appellant with a notice of adverse action of dismissal, effective September 15, 2003, after he was arrested and convicted of perjury, a felony, based upon the falsification of documents concerning the acquisition of three vehicles.[3] Appellant requested and received a Skelly meeting before an impartial Skelly officer on September 5, 2003. Under the Department's unwritten internal policy, the Skelly officer was vested with full authority to render a final determination on the adverse action, rather than merely to recommend a disposition. During the Skelly meeting, appellant's supervisor recommended that the dismissal be modified to a 30-day suspension. On September 10, 2003 the Skelly officer issued a written decision that stated:

> SKELLY MEETING DETERMINATION
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> This letter transmits the results of the Skelly Meeting held on September 5, 2003. Based on the information provided during the meeting and a thorough review of the information provided to me, I recommend that the adverse action be modified to an action other than dismissal.

[3] Appellant pled *nolo contendere* to one count and the other counts were dismissed in settlement.

During the hearing before the ALJ, the Skelly officer testified that he was confused about his authority to modify the penalty in this case and that he could not decide what would be the appropriate penalty. After consulting with counsel, he decided to recommend only that the action not be a termination, without specifying a penalty.

Believing the Skelly officer's decision to be irregular and inadequate, the Department decided not to implement the notice of adverse action. Appellant's supervisor told appellant to continue to report to work beyond the specified effective date of September 15, 2003. On September 19, 2003, the Department served a new adverse action of dismissal based upon identical charges as the prior action, with an effective date of October 8, 2003. The notice afforded appellant the opportunity for a new Skelly meeting before a different Skelly officer. Appellant did not request a Skelly meeting on the second notice of adverse action. Appellant filed an appeal from the first notice of adverse action with the Board on September 29, 2003.[4] Appellant filed an appeal from the second notice of adverse action with the Board on September 30, 2003.

Procedural Summary

At the hearing before the ALJ, appellant moved to dismiss the notice of adverse action on the ground that his due process rights had been violated by the Department's failure to implement the recommendation of the Skelly officer.[5] As noted above, the ALJ

[4] The appeal from the first notice of adverse action was assigned SPB Case No. 03-3008. By letter dated December 23, 2003, the Department advised the Board that the first notice of adverse action was not filed with the Board because of a "Skelly irregularity" and that no adverse action had been taken against appellant in Case No. 03-3008. Based upon these representations the Board deleted its file in Case No. 03-3008.

[5] The ALJ bifurcated the hearing to decide the procedural issue and did not reach the merits of the case.

issued a Proposed Decision recommending that appellant's motion to dismiss be granted. The Board rejected the ALJ's Proposed Decision and determined to decide the case itself. In its resolution rejecting the Proposed Decision, the Board asked the parties to brief the issue of whether, having generally delegated to its Skelly officers, by internal policy, the authority to modify penalties in adverse action cases, the Department has any authority to overturn the decision of a Skelly officer in a particular case, if it disagrees with the modification.

Having reviewed the record and the written and oral arguments of the parties,[6] the Board now finds that it need not reach the issue originally specified for briefing in this case because, as explained more fully below, the Skelly officer did not, in fact, issue a decision modifying the penalty in this case.

ISSUE

Did the Department violate appellant's Skelly rights when it re-served the notice of adverse action after the Skelly officer recommended that the adverse action be modified to something other than dismissal but failed to recommend a specific penalty?

DISCUSSION

California state civil service employees enjoy a substantial property interest in their jobs, such that they may not be dismissed or subject to other disciplinary action

[6] On August 30, 2004, three days before oral argument, the Board received a letter and document from appellant's representative entitled "Supplement to Appellant's Written Argument." Board rules do not provide for the filing of supplemental briefs after a matter has been briefed and is pending oral argument before the Board. Accordingly, the Board has not considered appellant's supplemental filing.

without cause as provided by statute.[7] Because this statutory right constitutes a "legitimate claim of entitlement" to a government benefit, the state "must comply with procedural due process requirements before it may deprive its permanent employee of this property interest by punitive action."[8]

As set forth in the seminal case of Skelly v. State Personnel Board, "[a]s a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."[9] Based upon Skelly, the SPB has, in Rule 52.3[10], established the procedures that must be followed before taking adverse action against a state civil service employee:

> (a) At least five working days before the effective date of a proposed adverse action, rejection during the probationary period, or non-punitive termination, demotion, or transfer under Government Code section 19585, the appointing power, as defined in Government Code Section 18524, or an authorized representative of the appointing power shall give the employee written notice of the proposed action. At least 15 calendar days before the effective date of a medical termination, demotion, or transfer under Government Code section 19253.5 or an application for disability retirement filed pursuant to Government Code section 19253.5(i)(1), the appointing power or an authorized representative of the appointing power shall give the employee written notice of the proposed action. The notice shall include:
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> (1) the reasons for such action,
> (2) a copy of the charges for adverse action,
> (3) a copy of all materials upon which the action is based,

[7] Skelly, supra, 15 Cal.3d at p. 207.

[8] Id. at p. 208.

[9] Supra, 15 Cal.3d at p. 215.

[10] 2 Cal. Code of Reg., §52.3.

(4) a notice of the employee's right to be represented in proceedings under this section, and
(5) notice of the employee's right to respond to the person specified in subsection (b).

(b) The person whom the employee is to respond to in subsection (a)(5) shall be above the organizational level of the employee's supervisor who initiated the action unless that person is the employee's appointing power in which case the appointing power may respond to the employee or designate another person to respond.

(c) The procedure specified in this section shall apply only to the final notice of proposed action.

The procedural protections afforded by Skelly and Board rule are based upon the due process right of an individual to notice of the charges of misconduct against him or her and an opportunity to respond to those charges prior to being deprived of the property right in his or her civil service position. Thus, the individual charged with misconduct has the right to respond to the charges before a reasonably impartial, non-involved reviewer who has the authority to make *or recommend* a final decision in the matter.[11] The courts and the Board have made clear that the Skelly officer need not have the authority to make a final determination to modify or revoke the penalty initially imposed by the appointing power, but must at least have the authority to recommend a final decision that the action be sustained, modified or revoked.[12] Moreover, while one of the purposes of these preremoval safeguards is to minimize the risk of error in the

[11] Williams v. County of Los Angeles (1978) 22 Cal.3d 731, 737; see also Anthony G. Gough (1993) SPB Dec. No. 93-26, p.4. (Skelly Officer should be impartial person who had not been directly involved with the investigation of the matters which led to the taking of adverse action).

[12] See Gary Blakely (1993) SPB Dec. No. 93-20; see also Titus v. Civil Service Commission (1982) 130 Cal.App.3d 357, 363; Coleman v. Regents of University of California (1979) 93 Cal.App.3d 521, 526.

initial removal decision,[13] there is no due process right to receive a final and binding decision from the Skelly officer.

Appellant contends that the Department was obligated to implement the Skelly officer's "decision" that the adverse action be "modified to an action other than dismissal," and that its failure to do so violated appellant's due process rights. The Board disagrees. Even if the Department did have an unwritten policy of giving its Skelly officers the authority to render final and binding decisions, the Skelly officer in this case did not, in fact, exercise the full scope of that authority. The plain language of the Skelly officer's letter clearly states that it is merely a "recommendation," not a final decision.[14]

By failing to specify a recommended penalty, however, the Skelly officer failed to exercise whatever discretion was vested in him in a manner sufficient to fulfill his obligations as a Skelly officer to make or recommend a final decision in the matter. The Skelly officer failed to provide the Department with a recommendation as to the appropriate penalty to be imposed, and thus did not reach a decision that was capable of implementation as the final disposition of the matter. Therefore, the Department acted reasonably in concluding that there was an irregularity in the Skelly process that warranted service of a new notice of adverse action.

The Department, however, failed to provide clear notice to appellant that it was withdrawing the original notice of adverse action. As stated by the Board,

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[13] Id. at pp. 214-215 (citing Arnett v. Kennedy (1974) 416 U.S. 134, 170 (concurring opn., Justice Powell)).

[14] Because we find that the Skelly officer did not, in fact, reach a final decision, the Board does not reach the issues of whether the Skelly officer was vested with authority to issue an final and binding decision or whether vesting him with such authority would have been lawful.

> [a]n employer may withdraw a notice of adverse action and serve a new notice without obtaining prior Board approval. If an employer takes such unilateral action, it must reimburse the disciplined employee for any backpay and benefits lost between the original effective date of the withdrawn adverse action and the new effective date of the new adverse action.[15]

Contrary to the Department's assertion, the fact that the Department did not file the first notice of adverse action with the Board, as required by Government Code section 19574, did not render that action ineffective. The adverse action was not withdrawn before its effective date. The filing requirement of Government Code section 19574 is directory only, not mandatory, and the failure to file a notice of adverse action with the Board does not invalidate an action.[16] Therefore, the Department should have provided formal notice to appellant and to the Board that it was withdrawing the first notice of adverse action due to a procedural irregularity.

The Department's failure to clearly notify appellant that it was withdrawing the first notice of adverse action did not, however, constitute a violation of appellant's Skelly rights. Appellant sustained no harm as a result of the first notice of adverse action and was afforded all Skelly rights to which he was entitled with respect to the second notice.[17] Since appellant did not suffer any loss of pay or benefits between the original effective date and the new effective date, he is not entitled to any reimbursement of wages or benefits.

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[15] Ethel Warren (1999) SPB Dec. No. 99-09, at p. 29, note 41.

[16] Ralph Rey (1999) SPB Dec. No. 99-10.

[17] Thus, this case is distinguishable from Beverly Wilson (August 12, 2004) SPB Case No. 03-1150R, in which the Board held that an employee's Skelly rights were violated where the appointing power instructed the Skelly officer not to comment on the level of penalty chosen by the appointing power, and then proceeded to implement the original action without modification. While decisions of the Board that are not designated as precedential are not binding on the Board, they may be cited as persuasive authority. (Gordon J. Owens) (1992) SPB Dec. No. 92-11.

CONCLUSION

Given the failure of the Skelly officer make or recommend a final decision in this matter, the Department acted reasonably in effectively withdrawing the notice of adverse action and re-serving it upon appellant and affording him the right to a new Skelly meeting. The matter is remanded for a hearing before an ALJ on the merits of the dismissal.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. Appellant's motion to dismiss is denied.
2. This matter is hereby referred to the Chief Administrative Law Judge who shall assign it for hearing on the merits before a different administrative law judge than the one who conducted the prior proceedings in this matter. The assigned administrative law judge shall prepare a proposed decision on the merits for review by the Board.
3. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD

William Elkins, President
Ron Alvarado, Vice President
Sean Harrigan, Member
Maeley Tom, Member
Anne Sheehan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on October 5, 2004.

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Floyd Shimomura
Executive Officer
State Personnel Board

[Landeros-dec]